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Japan-Commerce Treaty VII

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Court Cases Involving Treaty Questions

Restrictive Business Practices

U.S. v. R.P. Oldham Co. et al.

U.S. District Court, N.D. California

June 11, 1957

cit. 152 F. (Supp. 818 (1957))

This case was a criminal action charging a conspiracy in restraint of interstate and foreign commerce in Japanese wire nails in violation of sec. 1 of the Sherman Act (15 U.S.C.A. Sec. 1), sec. 73 of the Wilson Tariff Act (15 U.S.C.A. Sec. 8). Brought together as defendants were five U.S. corporations which import Japanese wire nails and resale on the West Coast of the United States, and an American subsidiary of a Japanese corporation which exports wire nails to the U.S. This decision deals only with motions to dismiss and strike and for bills of particulars.

It was contended by the defendants that art. XVIII (dealing with restrictive business practices) of U.S.-Japan FCN treaty provided the exclusive remedy available to the government. The Court (Judge Edward P. Murphy) held that the provision is permissive rather than mandatory, and was intended to supplement the anti-trust laws, not replace them; that even if the Art. were held to provide an exclusive remedy, defendants would have no standing to invoke it, since they were American corporations, and treaty was not intended to exempt U.S. nationals from their country's laws. The Court examined and interpreted arts. XIII and VII as well as art. XVIII of the treaty.

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NO: 271, JULY 28

Control:

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21342

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6:15 AM

REFERENCE: EMBDES 898, MAY 4, 1962, ITEM 1, EMBTEL 249.

EMB HAS LEARNED OFFICIALLY THAT GOJ INTENDS REQUEST REVISION OF ARTICLE XII OF US-JAPAN TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION. AS DEPT AWARE, THERE HAVE BEEN RECURRENT REPORTS IN RECENT MONTHS THAT GOJ THINKING OF REQUESTING SOME REVISION OF FCN TREATY (SEE REFDES). EMB COML ATTACHE WAS INFORMED THIS WEEK BY MEMBER OF BRITISH DELEGATION CURRENTLY IN TOKYO FOR UK-JAPAN FCN TALKS THAT GOJ RESISTING UK CITATION OF INVESTMENT PRIVILEGES ACCORDED TO US AS PRECEDENT FOR PRIVILEGES UK WANTS ON GROUNDS GOJ INTENDS REVISE RELEVANT PROVISIONS US-GOJ FCN, EMB COML ATTACHE QUERIED MTI OFFICIALS AND OBTAINED CONFIRMATION THEIR INTENTIONS.

EMB RAISED MATTER WITH DIRECTOR FONOFF ECON AFFAIRS BUREAU (SEKI) JULY 25 WHO SAID CABINET APPROVAL IS PENDING (DELAYED BY CABINET RESHUFFLE), AFTER WHICH GOJ WOULD FORMALLY NOTIFY US IN ACCORDANCE ARTICLE XXV BEFORE OCTOBER 30. SEKI SAID AFTER GOJ BECOMES SUBJECT IMP ARTICLE 8 AND NO LONGER ABLE MAINTAIN EXCHANGE RESTRICTIONS FOR B/P REASONS, GOJ "WILL NEED PROTECTION" OF KIND IT INTENDS SEEK THROUGH REVISION ARTICLE XII OF FCN TREATY.

PURPOSE, SAID SEKI, IS TO SAFEGUARD JAPANESE ECONOMY BY PERMITTING RESTRICTIONS ON IMPORTS OF BOTH CAPITAL AND TECHNOLOGY IN CASE OF "EMERGENCY". SEKI LIKENED GOJ DESIRE FOR SAFEGUARDS ON FOREIGN INVESTMENTS TO INSISTENCE WESTERN EUROPEAN COUNTRIES ON "SAFEGUARD CLAUSE" IN TRADE AGREEMENTS WITH JAPAN. IN ANSWER EMB QUERY, SEKI ACKNOWLEDGED MITI WOULD NO DOUBT TRY TO ATTACH A PERCENTAGE LIMITATION TO FOREIGN PARTICIPATION IN JAPANESE INDUSTRY WHICH WOULD SEEM TO REQUIRE REVISION ARTICLE VII AS WELL. (IN A POSSIBLY REVEALING SIDE REMARK, SEKI SAID MITI'S DISCUSSIONS WITH "SOME"

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WITH "SOME" JAPANESE INDUSTRIALISTS INDICATED LATTER SEEMED TO HAVE MORE FEAR OF MITI BUREAUCRATIC CONTROLS THAN "DOMINATION BY US CAPITAL CAPITAL".)

EMB SAID IT REGRETTED LEARN GOJ PLANNING MOVE IN DIRECTION INDICATED AND ASKED HOW THIS SQUARED WITH PUBLIC STATEMENTS BY NEW FINANCE MINISTER TANAKA ON NEED FOR LIBERALIZATION OF CAPITAL (EASING OF REMITTANCE RESTRICTIONS ANNOUNCED BY FINMIN DAY FOLLOWING THIS CONVERSATION, SEE EMBTEL 249). SEKI AVERRED SUBSTANCE OF REVISIONS TO BE SOUGHT BY GOJ "NOT AS HARMFUL AS IT MAY SOUND". SEKI SAID GOJ LIKELY SEEK REVISION ONLY ONE OTHER "MINOR" ASPECT FCN TREATY INVOLVING INDUSTRIAL RIGHTS WHICH HE DESCRIBED AS PURE TECHNICALITY.

UEMURA, VICE PRESIDENT INFLUENTIAL FEDERATION OF ECONOMIC ORGANIZATIONS (KEIDANREN) CONFIRMED TO EMB THAT KEIDANREN HAD BEEN CONSULTED AND HAD APPROVED DECISION TO SEEK REVISION. UEMURA ALSO CITED DISADVANTAGE OF PRECEDENT IN FCN TREATY IN NEGOTIATIONS OTHER COUNTRIES. IN ADDITION HE REMINDED EMB THAT FCN TREATY NEGOTIATED TEN YEARS AGO IN ENTIRELY DIFFERENT POLITICAL SITUATION.

COMMENT: EMB SOMEWHAT DISTURBED BY THIS LATEST INDICATION TREND OF GOJ THINKING IN TRADE POLICY FIELD. ATTEMPT TO TIGHTEN RESTRICTIONS ON LONG-TERM CAPITAL MOVEMENTS CONTRARY TO PREVAILING TREND AMONG INDUSTRIALIZED COUNTRIES AND OF QUESTIONABLE ECONOMIC VALIDITY FOR JAPAN AS NET IMPORTER OF CAPITAL. BELIEVE GOJ INTENTIONS MAY REFLECT GROWING STRENGTH OF PROTECTIONIST FORCES WITHIN GOJ, PRIMARILY MITI.

EMB BELIEVES DESIRABLE DEPT INFORM GOJ EMB WASH AT EARLIEST OPPORTUNITY (BEFORE POSITION SOLIDIFIES HERE WITH CABINET APPROVAL) THAT US SERIOUSLY DISTURBED LEARN GOJ PLANS SEEK REVISION OF FCN ALONG LINES INDICATED ABOVE AND REQUEST EARLY CLARIFICATION OF GOJ INTENTIONS. SHOULD POINT TO UNDESIRABILITY SUCH MOVE IMMEDIATELY BEFORE HIGH-LEVEL FINANCIAL TALKS BETWEEN TWO COUNTRIES SCHEDULED AND LIKELIHOOD ALSO CREATING POOR ATMOSPHERE FOR SECOND MEETING OF US-JAPAN CABINET LEVEL ECONOMIC MEETING. NEW TREATY WOULD REQUIRE SENATE APPROVAL. IN SENATE, JAPAN'S RETREAT TOWARD PROTECTIONISM LIKELY TO BE SUBJECT STRONG AND HIGHLY-PUBLICIZED CRITICISM TO DETRIMENT US-JAPAN RELATIONS AND INVESTMENT CLIMATE IN JAPAN.

EMB PREPARED SUBSEQUENT APPROACH HERE IF INSTRUCTED.

REISCHAUER

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MEMORANDUM

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With respect to the proposal, understood to be under consideration by the Government of Japan, for the revision of Art. XII and possibly other provisions of the 1953 Treaty of Friendship, Commerce and Navigation that were designed to encourage the investment of foreign capital in Japan, the Department of State submits the following:

1. Such revision of the treaty, assuming that the Department should be able to agree thereto, would have to be approved by a two-thirds vote in the United States Senate. The proposal would be interpreted there and by the general public as a movement in the direction of commercial and industrial protectionism. The strong and highly-publicized criticism that would undoubtedly follow would be detrimental to relations between the two countries and to Japan's commercial and industrial interests.
2. The treaty provisions that are being considered for amendment are common to treaties between the United States and the principal industrial states of the free world. The tendency in the other industrial states, particularly in the European Common Market countries, is in the direction of growing friendliness toward foreign investment as an essential ingredient of economic growth. The proposed action by Japan would constitute a backward step, dissociating that country from a general movement most promising for economic progress in the free world. The treaty that Japan now apparently desires with the United States is of the type that this Government has negotiated only with a few underdeveloped states.
3. The public adoption by Japan of a policy looking to restrictions upon foreign investment would almost certainly have the effect of encouraging restrictive policies in the less developed countries, where Japanese investment is greatly needed, both in the interest of Japan's economic welfare and

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that of the economic development of the less developed countries. If liberal attitudes toward foreign investment are to be developed in the less developed areas, the setting of good examples by the more advanced states is essential.

4. It is the Department's view that any concern in Japan regarding excessive growth of foreign investment that would be detrimental to Japan's national interest is wholly unjustified. Insofar as concern exists regarding possible future emergency situations affecting Japan's external financial position, paragraph 6 of the Protocol doubtless provides sufficient leeway for necessary action.

5. The Treaty of Friendship, Commerce and Navigation has now been in effect for nine years. During this period, it has been of very considerable advantage to Japan, both substantively in establishing favorable standards to govern economic relations with the United States, but also in contributing to Japan's favorable position in the world economy. The restrictions that Japan considered necessary to safeguard its financial position have, during much of this period, precluded the United States from obtaining extensive reciprocal advantages. Now that Japan has reached a position of such economic strength that greater liberalization might be expected to open up opportunities for United States investors, it is a discouraging fact to find the Japanese Government apparently moving toward cancellation of rights provided in the treaty.

6. The proposal for revision of the treaty cannot be regarded as contributing to a favorable atmosphere for the scheduled cabinet level economic meeting between the two Governments.

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MEMORANDUM

With respect to the proposal, understood to be under consideration by the Government of Japan, for the revision of Art. III and possibly other provisions of the 1953 Treaty of Friendship, Commerce and Navigation that were designed to encourage the investment of foreign capital in Japan, the Department of State submits the following:

1. Such revision of the treaty, even if the Department should be able to agree thereto, would have to be approved by a two-thirds vote in the United States Senate. The proposal would be interpreted there and by the general public as a movement in the direction of commercial and industrial protectionism. The strong and highly-publicized criticism that would undoubtedly follow would be detrimental to relations between the two countries and to Japan's commercial and industrial interests.

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2. The treaty provisions that are being considered for amendment are common to treaties between the United States and most of the principal industrial states of the free world. The tendency in the other industrial states, particularly in the European Common Market countries, is in the direction of growing friendliness toward foreign investment as an ^{important} essential ingredient of economic growth. The proposed action by Japan would constitute a backward step, dissociating that country from a general movement most promising for economic progress in the free world. The treaty that Japan now apparently desires with the United States is of the type that this Government has negotiated only with a few underdeveloped states.

3. The public adoption by Japan of a policy looking to restrictions upon foreign investment would almost certainly have the effect of encouraging

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restrictive policies in the less developed countries, where Japanese investment is greatly needed, both in the interest of Japan's economic welfare and that of the economic development of the less developed countries. If liberal attitudes toward foreign investment are to be developed in the less developed areas, the setting of good examples by the more advanced states is essential.

4. It is the Department's view that any concern in Japan regarding possible excessive growth of foreign investment that would be detrimental to Japan's national interest is wholly unjustified. The contribution of foreign investment to Japan's phenomenal economic growth in recent years is well known.

5. Paragraph 6 of the Protocol to the commercial treaty provides sufficient safeguards to meet possible future emergency situations affecting Japan's external financial position.

6. The Treaty of Friendship, Commerce and Navigation has now been in effect for nine years. During this period, it has been of very considerable advantage to Japan, both substantively in establishing liberal standards to govern economic relations with the United States, but also in contributing to Japan's favorable position in the world economy. The restrictions that Japan considered necessary to safeguard its financial position have, during much of this period, precluded the United States from obtaining extensive reciprocal advantages. Now that Japan has reached a position of such economic strength that greater liberalization might be expected to open up opportunities for the United States investors, the United States Government is disturbed to find the Japanese Government apparently moving toward cancellation of rights provided in the treaty.

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